

**STATE OF NEW MEXICO
NEW MEXICO WATER QUALITY CONTROL COMMISSION**

**In the Matter of:
PROPOSED AMENDMENTS TO
STANDARDS FOR INTERSTATE AND
INTRASTATE WATERS,
20.6.4 NMAC**

No. WQCC 20-51 (R)

**AMIGOS BRAVOS' REPLY IN SUPPORT OF MOTION TO STRIKE LANL'S
PROPOSED AMENDMENT TO 20.6.4.14.A NMAC AND LANL'S
MISREPRESENTATION OF AN EPA REGULATION**

Preliminary Statement

Amigos Bravos has moved to strike a proposed amendment to 20.6.4.14.A NMAC from Triad National Security, LLC, and the United States Department of Energy (collectively referred to as “Los Alamos National Laboratory” or “LANL”) on the ground that the proposed language is not supported by **any** evidence in the record. In its proposed amendment, LANL seeks to limit the sampling and analysis methods currently authorized by the Water Quality Control Commission (“Commission”) in 20.6.4.14.A NMAC. However, in its 12 page response, LANL fails to cite to **any** evidence in the record in support of its proposed language, effectively **conceding** there is no evidence in the record to support its proposal.

Any rule change to 20.6.4 NMAC adopted by the Commission must be based on “substantial evidence in the record.” NMSA 1978, § 74-6-7.B(2). LANL’s failure to cite to any evidence in the record means that the Commission has no legal basis to consider LANL’s proposed rule change and the proposal should be struck.

Instead of citing to evidence in the record to support its proposal, LANL attempts to rebut Amigos Bravos’ motion with highly technical and procedural arguments that have no merit and border on the frivolous. LANL has the temerity to argue that while Section 74-6-7.B(2) of the Water Quality Act requires:

. . . the Commission’s ultimate decision must be supported by “substantial evidence” to survive a petition for judicial review, there is no requirement that arguments and proposals contained in a parties’ [sic] post-hearing submittals be supported by “substantial evidence” already in the record.

LANL Resp., p. 6 (citation omitted). LANL’s suggestion – that the Commission can consider a revision to 20.6.4 NMAC put forth by a party that has no evidence in support even if it is subject to reversal on appeal – defies credulity.

Not only does Amigos Bravos support striking LANL’s proposed amendment to 20.6.4.14.A NMAC, the New Mexico Environment Department (“NMED”) concurs in Amigos Bravos’ Motion to Strike, stating that it “concurs in the Motion, the reasoning therein, and the relief requested.” NMED’s Concurrence in Amigos Bravos’ Motion to Strike LANL’s Proposed Amendment to 20.6.4.14.A NMAC, p. 1 (Dec. 23, 2021).

LANL has no argument on the merits, and none of its procedural arguments has merit. Amigos Bravos’ motion to strike should be granted.

Argument

I. LANL EFFECTIVELY CONCEDES THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT ITS PROPOSED AMENDMENT

Commission action, including the promulgation of regulations, must be supported by “substantial evidence in the record.” NMSA 1978, § 74-6-7.B(2). That administrative agency action must be supported by “substantial evidence” is a requirement that applies to virtually all state and federal administrative agencies. *See, e.g.*, NMSA 1978, § 74-2-9.B(2) (under Air Quality Control Act, Environmental Improvement Board action must be supported by “substantial evidence”); NMSA 1978, § 70-2-12.2.B(2) (under Oil and Gas Act, Oil Conservation Commission rule must supported by “substantial evidence”); 15 U.S.C. § 2618(c)(1)(B)(i)(I) (under Toxic Substances Control Act, U.S. Environmental Protection Agency (“EPA”) rule must

be supported by “substantial evidence”). This requirement ensures that agency action is based on evidence before the agency and that agency decisions are grounded in the record before it.

Here, LANL proposes to amend 20.6.4.14.A NMAC to limit the sampling and analysis methods authorized by the Commission for purposes of compliance with federal permits and state water quality standards.¹ LANL proposed this amendment for the first time in its post-hearing brief, which it is permitted to do. *See* 20.6.1.304 NMAC. However, LANL proposed this amendment without citing to **any** evidence in the record to support the amendment, which it is decidedly not permitted to do. *See* NMSA 1978, § 74-6-7.B(2).²

¹ LANL proposed:

20.6.4.14 SAMPLING AND ANALYSIS:

A. 40 CFR Part 136 approved methods shall be used to determine compliance with these standards and in Section 401 certifications under the federal Clean Water Act. **In cases of pollutants and pollutant parameters for which there are no approved methods under 40 CFR Part 136, analyses shall be conducted according to a test procedure specified in the applicable permit or 401 certification.** Where 40 CFR Part 136 approved methods are not required, sampling and analytical techniques shall conform with methods described in the following references unless otherwise specified by the commission pursuant to a petition to amend these standards: . . .

LANL’s Proposed Final Amendments at 7-8 (emphasis added); LANL’s Second Notice of Errata, ¶ 3 (adding the words “and pollutant parameters”).

² As explained in Amigos Bravos’ Motion to Strike, to support its proposal, LANL cites to the testimony of John Toll at 3 Tr. 771:20-772:4, 777:6-16, 766:7-13, 808:6-11. LANL Closing Argument at 47-48; LANL Proposed Stmt. of Reasons, ¶¶ 107, 109. All the transcript references cited to by LANL were attached to the Motion to Strike as Exhibit A with the relevant testimony of Mr. Toll highlighted. There is **nothing** in Mr. Toll’s testimony that supports LANL’s proposal. Instead, Mr. Toll testified that states may only use a Part 136 Method for compliance purposes or, if no Part 136 Method exists, an alternative test procedure approved by EPA. *See* 3 Tr. 771:21-23, 777:6-12 [Ex. A]. He **never** testified that states may use non-Part 136 Methods if no Part 136 Method exists.

In its response to Amigos Bravos' Motion to Strike, LANL all but concedes there is no evidence in the record to support its proposed amendment. In the whole of its response, LANL does not cite to any evidence from any witness that supports its proposed language. This is because there is no evidence in the record to support its newly-concocted proposal. LANL's proposal has no evidentiary basis in the record and therefore cannot be considered for adoption by the Commission and should be struck. *See* NMSA 1978, § 74-6-7.B(2).

Furthermore, while parties in this proceeding have a right to cross-examine LANL witnesses on the meaning and effect of its proposals, NMSA 1978, § 74-6-6.D, they had no opportunity to do so because neither LANL nor any other party put on a witness in support of this new language. As outlined in Amigos Bravos Motion to Strike at 7-9, LANL's proposed language is ambiguous and therefore it is all the more important for parties to have had the opportunity to cross-examine a witness on the proposed language.³

LANL's only defense on the merits is that the Water Quality Act only requires Commission action to be supported with "substantial evidence" on appeal, but that the Commission can consider a proposal from a party that is not supported by "substantial evidence." LANL Resp. at 6. LANL cannot seriously contend that the Commission can consider and adopt a regulation that has no evidentiary support and would be overturned on appeal. The

³ In its Second Notice of Errata, ¶ 3, LANL improperly attempts to amend its proposal by adding language referring to "pollutant parameters." LANL adds this language **after** Amigos Bravos filed its response pointing out that LANL neglected to include this term, which is in EPA regulations. *See* Amigos Bravos' Motion to Strike at 7-9. This even-later addition does not cure LANL's proposal, which is still ambiguous and should have been subject to cross-examination. For example, it is still unclear whether LANL's proposed language is intended to authorize NMED to require LANL to use EPA Method 1668C to test for polychlorinated biphenyls or "PCBs" to detect at certain numeric water quality standards established by the Commission. *See* LANL's Proposed Stmt. of Reasons, ¶ 116 (citing Toll testimony insisting NMED may only require use of EPA Method 1168C if approved as an alternative test procedure).

Water Quality Act makes it clear that adopting regulations not supported by “substantial evidence in the record” is error. NMSA 1978, § 74-6-7.B(2). If it is error to adopt a regulation not supported by substantial evidence, the Commission should not consider a proposal from a party that is not supported by **any** evidence.

II. LANL’S PROCEDURAL ARGUMENTS HAVE NO MERIT

LANL spends most of its brief raising procedural arguments that have no merit. These arguments should be rejected.

LANL first argues that the Commission’s rules allow parties to submit “revised proposed rule language” after conclusion of the hearing and therefore LANL is within its rights to submit new rule language in its post-hearing submission. LANL Resp., pp. 1-2, 5-6.

LANL, however, either misapprehends or mischaracterizes Amigos Bravos’ objection. Amigos Bravos does not object to LANL (or any other party) proposing “revised rule language” in its post-hearing brief. Amigos Bravos objects to LANL proposing revised rule language that has **no evidentiary support** in the record. Parties are free to submit revised rule language in their post-hearing briefs if **based on evidence in the record**.⁴

Next LANL argues that motions to strike rule proposals are not authorized by the Commission’s rules on rulemaking because there is no express reference in the rules for such a motion. LANL Resp. at 4.

The Commission’s rules on rulemakings at 20.1.6 NMAC allow for motion practice, but do not attempt to delineate, restrict, or limit the type or nature of motions that may be filed. *See*

⁴ LANL suggests that Amigos Bravos concurs with all newly revised proposals in the post-hearing briefs to which it did not object. LANL Resp. at 2 n.1. This is patently wrong. Amigos Bravos objects only to Commission consideration of LANL’s newly revised proposals that have no evidentiary support in the record.

20.1.6.207 NMAC. Indeed, it would be a nearly impossible task to list all motions that conceivably could be legitimately filed before the Commission. Neither the Commission's rules, nor the New Mexico Rules of Procedure for the District Courts for that matter, attempt to set forth an exhaustive or exclusive list of motions that may be filed.

Under the Commission's rules, motions must specify the grounds for the motion and the relief sought. 20.1.6.207.A NMAC. Amigos Bravos' Motion to Strike complies with these requirements, and is properly before the Commission.

Moreover, under the Commission's rules, the hearing officer has "authority to take all measures necessary for the maintenance of order and for the efficient, fair and impartial consideration of issues arising in [the rulemaking] proceedings" Ensuring that the Commission does not consider a proposed rule change that would result in error certainly falls within the Hearing Officer's authority to take measures to maintain an orderly hearing.

LANL likens Amigos Bravos' Motion to Strike to a motion to strike filed under Rule 1-012(F) of the Rules of Procedure for the District Courts, and claims Amigos Bravos' motion is not a proper Rule 1-012(F) motion because it does not seek to strike a "pleading." LANL Resp. at 7-8. LANL also claims Amigos Bravos' motion is not a proper Rule 1-012(F) motion because it does not seek to strike "redundant, immaterial, impertinent or scandalous" material. *Id.* at 8-10.

Amigos Bravos' Motion to Strike LANL's Proposed Amendment to 20.6.4.14.A NMAC, however, is not analogous to a motion to strike under Rule 1-012(F), and the requirements of that state court rule of civil procedure have no bearing on the merits or propriety of the Amigos Bravos' motion before the Commission.

Amigos Bravos' Motion to Strike is more analogous to a motion to exclude evidence, which is provided for in the Commission's rules at 20.1.6.100.B(3) NMAC, because it seeks to

exclude LANL's proposal from consideration by the Commission. Amigos Bravos has no objection to reframing the motion as a "motion to exclude" if that remedies some technical objection from LANL.

LANL argues that Amigos Bravos' Motion to Strike is not timely filed, again analogizing the motion to Rule 1-012(F) which requires filing within 30 days of service of the pleading at issue.

Again, Rule 1-012(F) has no application to Amigos Bravos' Motion to Strike. The Motion to Strike is timely filed. The Commission is scheduled to deliberate on the parties' proposals March 1-3, 2022. Amigos Bravos filed its motion on December 8, 2021, nearly three months before deliberations on the proposal Amigos Bravos moves to strike. This leaves ample time for briefing and decision on the motion, as evidenced by the fact that the Hearing Officer has scheduled argument on December 30, 2021.

LANL repeatedly claims that Amigos Bravos' Motion to Strike is some sort of a "guise" to augment its arguments in its post-hearing brief. LANL Resp., pp. 3, 11. This argument is as frivolous as it is insulting. There is no basis for accusing counsel for Amigos Bravos of unprofessional conduct when LANL has effectively conceded the merits of the Motion to Strike, that is, there is no evidence in support of its proposed amendment to 20.6.4.14.A NMAC.

Furthermore, there is no need for Amigos Bravos to augment its case that the Commission should reject LANL's proposals to restrict the sampling and analysis methods in 20.6.4.14.A NMAC. Amigos Bravos, through the expert and compelling testimony of Dr. Jamie DeWitt, David Hope, and Ann Bailey, put on an extremely strong and convincing case that LANL's proposal to limit testing procedures is not required by EPA regulation and would result

in inadequate monitoring of water pollutants on LANL property. *See* Amigos Bravos' Proposed Stmt. of Reasons, ¶¶ 100-144.

Finally, LANL argues that allowing Amigos Bravos' Motion to Strike to be heard sets a precedent that would "invite wasteful briefing" and "prolong these proceedings." LANL Resp., p. 11.

In fact, hearing Amigos Bravos' Motion to Strike will have the opposite effect and will save Commission time and resources. It would be a poor use of the Commission's limited resources to deliberate on a proposed rule change that has no basis in the record and could not survive appeal and an even worse use of the Commission's limited resources to defend a rule change on appeal that has no basis in the record. Excluding the proposed amendment prior to deliberations will save the Commission time and resources, make for more efficient deliberations, and help ensure a final decision that would be upheld on any appeal.

III. LANL CONCEDES THAT IT MISQUOTED THE EPA REGULATION

Amigos Bravos' Motion to Strike also requested the Commission to strike LANL's reference in its post-hearing brief to an EPA regulation that it misquoted. In its Proposed Statement of Reasons, LANL misquoted an EPA regulation that Mr. Toll had misquoted in his direct testimony and which Amigos Bravos' counsel pointed out to him during cross examination. *See* LANL Proposed Stmt. of Reasons, ¶ 111; LANL Ex. 7 at 6, ll. 9-14; 3 Tr. 785:13- 786:1, 787:19-25.⁵

⁵ LANL alleged in its post-hearing brief:

Section 304(h) of the CWA requires EPA to promulgate the analytical methods that regulated entities must use when analyzing the chemical properties of environmental samples for reporting under the NPDES permit program. LANL Ex. 7 at 6 (Toll Direct). **40 C.F.R. 122.44(i)(1)(iv) provides that each NPDES permit includes requirements to monitor compliance with effluent limitations**

After Amigos Bravos filed its Motion to Strike, LANL conceded its error in its Second Notice of Errata in which it deleted the quotation marks and brackets in the bolded language in footnote 5 herein and added a footnote citing Dr. Toll’s testimony.

Conclusion

For the reasons set forth herein and in Amigos Bravos’ Motion to Strike, Amigos Bravos respectfully requests that LANL’s proposed amendment to 20.6.4.14.A NMAC be struck.

Respectfully submitted,

/s/ Tannis Fox

Tannis Fox
Western Environmental Law Center
409 East Palace Avenue, Suite 2
Santa Fe, New Mexico 87501
505.629.0732
fox@westernlaw.org

Attorneys for Amigos Bravos

Certificate of Service

I certify that a copy of the foregoing was emailed to the following on December 29, 2021:

John Verheul
Assistant General Counsel
Office of General Counsel
New Mexico Environment Department
121 Tijeras, NE, Suite 1000
Albuquerque, New Mexico 87102
John.verheul@state.nm.us

Louis W. Rose
Kari Olson
Montgomery & Andrews, P.A.
P.O. Box 2307
Santa Fe, New Mexico 87504-2307
lrose@montand.com
kolson@montand.com

“[a]ccording to test procedures approved under Part 136 for the analyses of pollutants having approved methods under that part, and according to a test procedure specified in the permit for pollutants with no approved methods.” *Id.* at 6.

LANL Proposed Stmt. of Reasons, ¶ 111 (emphasis added). However, the language quoted above is not found in 40 C.F.R. 122.44(i)(1)(iv).

Maxine McReynolds
Office of Laboratory Counsel
Los Alamos National Laboratory
P.O. Box 1663, MS A187
Los Alamos, New Mexico 87545
mcreynolds@lanl.gov

Silas R. DeRoma
Stephen Jochem
U.S. Department of Energy
National Nuclear Security Administration
Los Alamos Site Office
3747 West Jemez Road
Los Alamos, New Mexico 87544
Silas.deroma@nnsa.doe.gov
Stephen.jochem@nnsa.doe.gov

Carolyn McIntosh
Alexander Arensberg
Squire Patton Boggs LLP
1801 California Street, Suite 4900
Denver, Colorado 80202
Carolyn.mcintosh@squirepb.com
Alexander.arenberg@squirepb.com

Jolene McCaleb
Elizabeth Taylor
San Juan Water Commission
P.O. Box 2540
Corrales, New Mexico 87048-2540
jmccaleb@taylormccaleb.com
etaylor@taylormccaleb.com

Stuart R. Butzier
Modrall Sperling Roehl Harris & Sis, P.A.
P.O. Box 2168
Albuquerque, New Mexico 87103-2168
srb@modrall.com

Dalva Moellenberg
Gallagher & Kennedy
1239 Paseo de Peralta
Santa Fe, New Mexico 87501-2758
dml@gknet.com

Kyle Harwood
Luke Pierpont
Egolf + Ferlic + Martinez + Harwood, LLC
123 W. San Francisco St., Floor 2
Santa Fe, New Mexico 87501
kyle@egolfaw.com
luke@egolfaw.com

Charles de Saillan
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, New Mexico 87505-4074
cdesaillan@nmelc.org

Robert F. Sanchez
Assistant Attorney General
Office of the Attorney General
P.O. Box 1508
Santa Fe, New Mexico 87504-1508
rfsanchez@nmag.gov

/s/ Tannis Fox
Tannis Fox